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Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Appellants,

vs.

LEONARD PAUL HODORY,
Appellee.

ON DIRECT APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

Jurisdictional Statement

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JURISDICTIONAL STATEMENT

This case is on appeal from a decision of a three judge United States District Court for the Northern District of Ohio, Eastern Division declaring that Section 4141.29(D)(1)(a) was unconstitutionally applied in denying unemployment compensation benefits to Leonard Paul Hodory and those similarly situated.

OPINIONS BELOW

The three judge Court's Memorandum Opinion and Order issued March 4, 1976 styled below as case no.

C75-15Y and Order of March 6, 1976 granting a stay of the injunction are not officially reported to date. A copy of each of the Orders and Opinion is attached to this jurisdictional statement.

GROUNDS FOR JURISDICTION

Plaintiff's Complaint in an action entitled Leonard Paul Hodory v. Ohio Bureau of Employment Services and Albert G. Giles, challenged the constitutionality of Section 4141.29(D)(1)(a) asking that its application be enjoined as being in conflict with the Federal Society Security Act and Amendment XIV of the United States Constitution pursuant to 28 U.S.C. Section 1343 (3) and (4) and 42 U.S.C. 1983. A three judge district court was convened under authority of 28 U.S.C. Sections 2281 and 2284. By Order entered on March 4, 1976 the United States District Court for the Northern District of Ohio found the statute unconstitutional as applied to the plaintiff and those similarly situated and enjoined its enforcement. On March 26, 1976 Attorney General William J. Brown filed a Notice of Appeal in the United States District Court for the Northern District of Ohio, Eastern Division. On April 6, 1976 the three judge district court entered a Motion for Stay Order pending the outcome of the appeal.

This court has jurisdiction to consider this appeal under 28 U.S.C. 1253. *Radio Corp. of America v. U.S.*, 96 F. Sup. 660, District Court (Illinois) affirmed 341 U.S. 412, 71 S. Ct. 806; *Brotherhood of Locomotive Engineers v. Chicago R.I. and P.R. Co.*, 382 U.S. 423; *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 8 S. Ct. 568; *Loeb v. Trustees of Columbia Township*, 179 U.S. 472, 21 S. Ct. 174.

STATUTE INVOLVED

The validity of the following section of the Ohio Revised Code is involved in this appeal. Section 4141.29 (D)(1)(a):

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) For any week with respect to which the administrator finds that:
>
> (a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

Section 4141.29 is set forth in its entirety in the appendix, page 34.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Is Ohio's labor dispute disqualification as in effect at the time of the labor dispute in question in conflict with the Federal Social Security Act?

(2) Can a state system of Unemployment Compensation predicate disqualification from benefits on grounds other than fault?

(3) Was there a suitable governmental interest underlying the Ohio "Labor Dispute" disqualification as in effect at the time of the strike such that Section 4141.29(D)(1)(a) was not unconstitutional as applied to Leonard Paul Hodory and those similarly situated?

(4) Is the decision of the Three Judge District Court in conflict with other jurisdictions and against the weight of authority?

(5) Does the decision of the Three Judge District Court deprive the respective employers of their substantive and procedural due process rights under the 5th and 14th Amendments?

STATEMENT OF THE CASE

This case involves the constitutionality of Section 4141.29(D)(1)(a), Ohio Revised Code, which contains essentially the same language as the original statute enacted in 1936. Several amendments to the statute have been made for clarification purposes, but the wording contained in (D)(1)(a) has been in effect since 1963.

This section disqualifies a claimant from receiving unemployment benefits when he becomes unemployed due to a labor dispute other than a lockout at any

factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed. An individual is disqualified in cases where his unemployment is caused by a labor dispute at another place, either within or without this state, if owned or operated by the same employer and which supplies materials or services necessary to continue the operation of the individual claimant's last place of employment.

Plaintiff-appellee was one of more than twelve hundred fifty steelworkers furloughed by United States Steel Corporation and Republic Steel Corporation as a result of a national strike by the United Mine Workers at coal mines owned and operated by both steel companies. These company owned mines supplied fuel for the operation of the various facilities engaged in the manufacturing of steel products owned and operated by U.S. Steel Corporation and Republic Steel Corporation in Ohio which were forced to shut down due to the lack of fuel.

A large number of other steel workers employed by U.S. Steel Corporation and Republic Steel Corporation at other Ohio facilities were also affected by the strike, and perfected their appeal to the Ohio Bureau of Employment Services pursuant to Section 4141.28, Ohio Revised Code. The Bureau, upon hearing evidence from all concerned parties, granted benefits to these employees on the basis that the company owned coal mines did not supply a sufficient amount of fuel to effect a plant shut down. The Steel companies are appealing these decisions in the state courts.

Plaintiff-appellee and his co-workers filed applications for unemployment benefits with the Ohio Bureau of Employment Services which were disallowed for the

reason that the labor dispute at the coal mines owned and operated by United States Steel Corporation was the cause of the claimant being unemployed. The decision of the Ohio Bureau of Employment Services wherein the plaintiffs-appellees were disqualified from receiving benefits was consistent with previous Bureau and Board of Review decisions, case law in Ohio as stated in *Cornell v. Bailey*, 163 Ohio St. 50, 25 N.E. 2d 323 (1955) and *Adamski v. Bureau of Unemployment Compensation*, 108 Ohio App. 82, 155 N.E. 2d 518 (1959) and in other states having the same or similar disqualifications. *Abernathy v. Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963) Certiorari denied, U.S. Sup. Ct. 375 U.S. 161 (1963); *Spielmann v. Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940); *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941). These appeals are now pending before the Board of Review but are being stayed pending a final decision in this case.

Plaintiff-appellee, during the pendency of his appeal in the state administrative process, filed this class action against the Ohio Bureau of Employment Services and Albert G. Giles, Administrator, on behalf of himself and all others similarly situated in the United States District Court, Northern District of Ohio, Eastern Division pursuant to 42 U.S.C. Section 1983 seeking declaratory and injunctive relief on the grounds that Ohio Revised Code, Section 4141.29(D)(1)(a) was unconstitutional on its face and as applied, violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. Section 303(A)(1),(3) of the Social Security Act of 1935, as amended, 42 U.S.C. Section 503(A)(1),(3).

Plaintiff-appellee did not name as defendant his employer, United States Steel Corporation, Ohio Works, Youngstown, Ohio nor did he name as defendants the other United States Steel Corporation facilities or Republic Steel Corporation, employers of the class which plaintiff-appellee alledged to represent, and whose financial interests would be substantially affected by any decision in this case.

Ohio Revised Code, Section 4141.28(O) mandates that all interested parties be named appellees in any state proceeding in order for each party to protect their respective interests. United States Steel Corporation and Republic Steel Corporation both have a substantial financial interest in the instant case because it is their respective accounts that will be affected as a result of a final decision in this case.

This case proceeded as a class action and upon motion by Plaintiffs-appellees, the United States District Court convened a three judge panel to determine the constitutionality of Section 4141.29(D)(1)(a), Ohio Revised Code.

Defendant's-appellants' opposition consisted of the following:

(1) The case is not a proper case for a three judge district court in an action for an injunction for money damages
(2) Plaintiffs-appellees failed to exhaust their remedy at law
(3) Plaintiff Hodory and his co-workers had a pending appeal before the Board of Review, Ohio Bureau of Employment Services
(4) Plaintiffs-appellees failed to meet the requirements of Federal Rules of Civil Procedure, Rule 23(b)(3)

(5) The unemployment compensation laws in Ohio are solely the state's concern and have not been preempted by the Federal Government.

(6) The U.S. District Court should abstain from hearing the case on the basis of (a) comity and (b) Plaintiff-appellee was already in litigation on the issues of entitlement to benefits before the Board.

Briefs were submitted and oral arguments were heard by the three judge panel on the above issues. No evidentiary hearing was held to submit evidence on the merits or evidence presented to show the impact on the unemployment fund and employer's accounts nor the special interests of the defendants. Neither U.S. Steel Corporation or Republic Steel Corporation, the employers, were parties to this action.

The three judge court issued its Memorandum Opinion and Order on March 5, 1976 (Appendix 48) wherein the court held:

(1) Abstention would not be proper in this case (Opinion p. 5)

(2) The prerequisites to certification of a class action under 23(a) have been met. (Opinion p. 6)

(3) Defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. (Opinion p. 10)

(4) Section 4141.29(D)(1)(a) as applied violated plaintiff's rights under the Equal Protection Clause of the 14th Amendment and the rights guaranteed by 42 U.S.C. Section 1983. (Opinion p. 11)

Final judgment was entered May 5, 1976 (Appendix 61). Defendants' Motion for a Stay Order, pending

this appeal was granted on April 6, 1976 (Appendix 62).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. THE CLASSIFICATIONS RESULTING FROM OHIO'S "LABOR DISPUTE" DISQUALIFICATION AS IN EFFECT AT THE TIME OF THIS LABOR DISPUTE ARE SUPPORTED BY REASONABLE AND SUBSTANTIAL BASES AND FURTHER A SUITABLE GOVERNMENTAL INTEREST.

Any examination of a state labor dispute disqualification must begin with an examination of its statutory history. The Ohio unemployment compensation insurance laws, like the laws of many of the other states, were patterned after the British law first adopted in 1911. (National Insurance Act, 1-2 Geo. V. Ch. 55 (1911)). At the outset, the administrators of the British unemployment insurance laws maintained an official position of "neutrality" with respect to unemployment which occurred as a result of a labor dispute. Under the English law, the cause of the dispute and the merits of the dispute were immaterial. If unemployment was the result of a labor dispute, it was not compensable. Historically, two reasons have been furthered for the English law: (1) it was considered unwise to permit the fund to be used to subsidize workers unemployed because of a trade dispute, (2) to protect the unemployment fund from being depleted by the payment of benefits under circumstances not contemplated by the insurance coverage. The English law, like the Ohio law was designed to pay benefits when unemployment was due to "fluctuations in trade." (See Hughes, Principals Underlying Labor-Dispute Dis-

qualification, p 2 (1946); Report of Committee on Economic Security, H.R. Doc. No. 81, 74th Cong., 1st Session (1935)). An examination of the history of the labor dispute disqualification when considered in the light of the fact that the unemployment tax rate is based upon a finite, legislatively determined level of risks, leads to the conclusion that Hodory and those similarly situated are simply not "covered" by the Ohio "policy" of unemployment insurance.

Ohio's General Assembly in enacting the statute that was in force at the time of the labor dispute did not charge a high enough rate to support coverage of this class of workers. It is apparent that there were several state interests served by the legislature's decision to exclude those persons situated like Hodory. Like the British law the Ohio law recognized that there was certainly a state duty to remain neutral in labor disputes. So strong is this policy that it has been codified in the National Labor Relations Act. On October 1, 1975 the United States District Court, District of Hawaii in *Hawaiian Telephone Co., v. State of Hawaii Department of Labor and Industrial Relations*, Civil No. 74-140 struck down a state statute that allowed the payment of unemployment compensation benefits to workers unemployed due to a labor dispute. Certainly if the policy of "state neutrality" is strong enough to warrant the negation of a state statute, it ought to be *at least* sufficient to support a state statute denying such benefits.

The second rationale of the British law is also equally applicable to the Ohio law. The British rationale was to protect the unemployment fund against having to pay for uninsured risks. This rationale has been upheld as a valid state interest by this court in

Geduldig v. Aiello, 417 U.S. 484, 94 S. Ct. 2485 (1974) hereinafter cited as *Geduldig*. In that case as in the instant case the underlying program of unemployment insurance was designed to function in accordance with insurance concepts. In that case, as in Ohio, the system was designed to be self-sufficient by maintaining an equilibrium between the insured risks and the amount of "premium" contributed to the fund. In *Geduldig*, *supra*, as in the instant case, the plaintiff complained of a denial of equal protection because of the alleged "underinclusiveness" of the set of risks that the state had selected to insure. In that case this court recognized that there was no constitutional necessity for insuring against all possible risks, and that "the legislature may select one phase of one field and apply a remedy there neglecting the others" (*Geduldig*, *supra*, at 495 quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955)). This court continued to state that this was particularly true of social welfare programs, so long as the line drawn by the state is rationally supportable. "The Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all". *Dandridge v. Williams*, 397 U.S. 471, 486-487 (1970). In *Geduldig*, *supra*, at 496 this Court recognized that there were legitimate state interests in maintaining a level of "insurance" that would not escalate the contributions required to support the system, and that there was a valid interest in maintaining the self-supporting nature of the State's unemployment insurance program. At this point it is significant to note that while Ohio's system of unemployment insurance is self-sufficient, other states having laws that allow the payment of benefits

to individuals in the Hodory classification have been forced to borrow money from the Federal Government. Such states will borrow an estimated 1.9 billion dollars from the Federal Government in 1976 alone, and have borrowed $3,007.2 billion as of April 15, 1976. In *Geduldig*, *supra* at 496, this court held that "These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has."

In addition to neutrality and the state interests upheld in *Geduldig*, *supra*, the State of Ohio has the additional interest of protecting its business economy from the crushing impact of the District Court decision.

Over the years the State of Ohio has sought to provide the widest possible coverage that would be economically feasible for small businesses as well as large corporations. The judicial expansion of this coverage coupled with the new appeals on old claims that will result from the District Court's decision will not only force the State to borrow, at interest, from the Federal Government, but will cause a sharp rise in every employer's contribution rates for years to come. Considering that the district court's decision will provide a basis for new actions on old claims against employers that may no longer be doing business in the State of Ohio, the result will be to overburden its "Mutualized" Account, which is the general miscellaneous fund into which all Ohio employers must pay in order to cover those instances in which an employer's positive balance drops below zero.

There is a further state interest in not extending unemployment coverage to the unemployed non-striking employee in that the possibility of collusion between those participating in a dispute and those not

participating would make the process as administered and budgeted for, at the time of this labor dispute unworkable and vulnerable to fraud.

The classification of workers situated like Hodory who have been denied benefits is thus supported by substantial governmental interests.

B. THE OHIO SYSTEM OF UNEMPLOYMENT COMPENSATION IS NOT IN CONFLICT WITH THE FEDERAL SOCIAL SECURITY ACT.

The plaintiff in the proceeding before the Three Judge District Court argued that the Ohio Unemployment Compensation System, as in force at the time of the labor dispute in question, was in conflict with 42 U.S.C. Section 503(a)(1). The plaintiff's argument failed to take into consideration several important factors. Historically, the Federal Social Security Act as enacted on August 14, 1935 and as amended since that time contains no provision or restriction addressed to the states concerning the type of employment that must be covered or the types of conduct that can give rise to disqualification. Rather, the act has provided that the employers in the states that have enacted unemployment compensation laws can receive a credit against the Federal Unemployment tax for the amount of state tax paid. In *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937) and *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937), this court considered the relationship between state systems of unemployment insurance and the Federal Social Security System in terms of the coverage afforded. This court concluded that the administration of the state's system of Unemployment Compensation was a function of the police power of the state and that

each state could select for its citizens that system which would best serve their local needs. This reflected the feelings of President Roosevelt who professed that so long as state systems of Unemployment Compensation conformed with the requirements of the federal act, the administration of the unemployment insurance funds and the determination of eligibility of claimants should be left in the hands of state executive and judicial instrumentalities (H.R. Doc. No. 81, 74th Cong., 1st Session VI (1935)). This philosophy is grounded both upon Tenth Amendment considerations and upon the belief that economic situations are at least in some respects related to geographic considerations and that the type of system appropriate for one state would not be adequate for another, as where one state may be industrial and another agrarian.

As recently as 1969 the United States Congress has rejected proposals that Congress draft legislation concerning employee eligibility and disqualification for Unemployment benefits. Chairman Mills stated that this was an area left to the states and that they should be "given the latitude to enable them to write the type of program that they want" (115 Cong. Rec. 34106, 1969). The Preface to the "Comparison of State Unemployment Insurance Laws" U.S. Department of Labor (1972) V. C. Hodgson, Secretary, begins by saying at page iii:

> "In the Federal-State system of unemployment insurance established in this country under the Social Security Act, the individual states have been free to develop the particular program that seems best adapted to conditions prevailing within the state. Consequently, no two State laws are alike".

The State of Ohio has, pursuant to this authority, chosen to enact legislation disqualifying those who are unemployed due to a labor dispute. In so doing they have excluded not only those actually picketing, but also those who are idled because of the dispute, when that dispute occurs at a location functionally integrated with the employee's place of employment. It was, and is, within the police power of the State of Ohio to so legislate. (See *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Industrial Relations, et al.*, United States District Court, District of Hawaii, Civil No. 74-140, 10/1/75). It is significant to note that the Ohio Act has been certified as acceptable by the Secretary of Labor as in conformity with the Federal statutes. Surely the Ohio Act would not have been certified if the labor dispute provision were of doubtful constitutionality. (See Appendix 69).

C. A STATE SYSTEM OF UNEMPLOYMENT COMPENSATION MAY PREDICATE DISQUALIFICATION FROM RECEIVING BENEFITS UPON ANY REASONABLE BASIS.

The plaintiff and the three judge district court have both erroneously contended that the disqualification from receiving unemployment benefits can be predicated only upon "fault" (See Memorandum Opinion and Order, p. 8, Appendix 48).

Unemployment Compensation benefits are paid where a risk that has been insured against comes to fruition. In deciding what risks are to be insured against, the state legislature has broad discretion (See *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937), hereinafter cited as *Carmichael*). This discretion is necessary because economic and employment condi-

tions vary from jurisdiction to jurisdiction and according to geography.

In *Matter of Heitzenrater*, 19 N.Y. 2d 1 (1966) at page 7 Judge Fuld in discussing whether a labor dispute disqualification should be based on "fault" said that "fault" is not a "meaningful concept" when applied to the labor dispute disqualification because it tends to vest in the officials of an unemployment system, the power to decide questions of labor relations better left to Federal and State arbitrators.

The system of coverage and disqualification proceeds upon various other factors not limited to either fault or voluntariness. (See *Speilmann v. Industrial Commission*, 236 W 13, 240, 295 N.W. 1) There are entire industries that are not within the coverage of the unemployment insurance compensation system, yet it has been held that such exclusion is constitutional (*Carmichael, supra*). Under the Ohio law agricultural workers are excluded from coverage under Ohio Revised Code Section 4141.01(B)(3)(a), as are some commissioned salesmen under Ohio Revised Code 4141.01(B)(3)(g) and independent contractors under Ohio Revised Code 4141.01(B)(1)(b). While school teachers out of work over lengthy school vacations are denied benefits for those months, certainly, no one would argue that there is "fault" inherent in the profession of teaching. Individuals that are laid off from covered employment, who are sick or hospitalized, are denied benefits because they are not actively seeking work (see Ohio Revised Code Section 4141.29(A)(4)). All individuals who apply for unemployment benefits are denied payment for their first waiting week (4141.29(B)), yet this is certainly not a fault disqualification. Individuals who are forced to retire are

in many instances disqualified. Finally, extended benefits are available to an unemployed worker only in states having a certain percentage of the total workforce unemployed or having what is called an "on indicator". (Section 4141.301). Clearly, there is no blackletter formula for disqualification, rather, there are conditions and circumstances which the State legislature has elected not to compensate. Although "fault" may be one of these conditions, as is voluntariness of unemployment, there are, within the appropriate sections of the Ohio Revised Code, other equally valid non-fault criteria as stated above.

In *Carmichael, supra* at 519 this court said

> "What we have said as to the validity of the choice of the subject of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt, (citations omitted), or where it is most practicable to deal with it, (citations omitted), it may exclude others whose need is less, (citations omitted), or whose effective and is attended by inconvenience which is greater (citations omitted)."

D. THE DECISION OF THE THREE JUDGE DISTRICT COURT WILL DENY U.S. STEEL AND REPUBLIC STEEL OF THEIR SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

It was the understanding of both parties in the Court below that the issue before the Three Judge District Court concerned the propriety of class certi-

fication, the adequacy of notice to the class members, and the necessity for a three judge district court. When the court proceeded to decide not only those matters but also the merits of the case, the employers, U.S. Steel and Republic Steel were denied an opportunity to appear and present evidence bearing upon the economic effect of paying benefits (See *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115 (1974)). This coupled with the fact that neither employer has as yet been permitted to intervene or present amicus briefs constitutes a denial of procedural due process. The employers in this case stand to lose substantial sums of money over the next few years if their account is charged as directed by the district court.

Unlike other forms of social legislation, Ohio's system of Unemployment Compensation is not funded from the General Revenue nor does it depend upon employee contributions; rather, it is funded *in toto* by the *employer*. The amount that each employer must annually contribute is calculated based upon his "experience rating". The "experience rating" refers to the relationship existing between the "positive" or "negative" balance in an employer's account with the state, compared to the number and amount of the charges against it when viewed over a period of time as set by state statute.

When there are charges against an employer's account because of the payment of unemployment benefits to his employees, the balance in the employer's account necessarily decreases. When this balance drops below a certain sum, the employer's tax rate for the next ensuing year is increased to offset the deficit. By being denied an opportunity to intervene, U.S.

Steel and Republic Steel are being deprived not only of their favorable experience rating, which is part of the goodwill assets of their business, but of the money that will be required in future years to recoup their lost level of positive balance.

The involvement of the Three Judge District Court constitutes a denial of substantive due process in that there is no procedure by which a Federal Court may engage in the legislative function of establishing tax rates. Each specific unemployment tax rate classification used in connection with experience ratings is determined by the state legislature based upon the contemplated scope of the state's Unemployment insurance coverage. Each rate contemplates a certain level of statutory disqualification. The judicial elimination of a disqualification disturbs this balance and necessitates a higher tax in order to pay the benefits available under the judicially broadened statute. This is tantamount to a judicially ordered increase in taxation, which violates the statutory mandate that the tax be established by the legislature. The District Court's decision thus attempts to do what even the Federal Social Security Administration has not chosen to do, in that it attempts not only to determine who will receive unemployment benefits, but at which rate the employer will be taxed. This is in violation of the Tenth Amendment of the United States Constitution.

Further, this is an area in which the court should not attempt to substitute its judgment for the judgment of the legislature. Debatable questions in respect to the reasonableness of legislation enacted pursuant to the state police power are not for the court but for the legislature. (See *Sproles v. Benford*, 286 U.S. 374, 52 S. Ct. 581 (1932)).

E. THE DECISION OF THE THREE JUDGE DISTRICT COURT IS IN CONFLICT WITH THE DECISIONS OF OTHER JURISDICTIONS AND AGAINST THE WEIGHT OF LAW AND AUTHORITY.

The decision of the three judge district court is in direct conflict with the following State and Federal statutes and case law. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 57 S. St. 868 (1937), *W. H. H. Chamberlin, Inc. v. Elmer F. Andrews, Industrial Commissioner of the State of New York*, 271 N.Y. 1, 299 U.S. 515 and 301 U.S. 714 (1937), *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S. Ct. 883 (1937), *Geduldig v. Aiello*, 417 U.S. 484, 94 S. Ct. 2485 (1974), *Hawaiian Telephone Co. v. State of Hawaii Dept. of Labor and Industrial Relations*, United States District Court, District of Hawaii, Civil No. 74-140, 10/1/75, *Spielmann v. Industrial Commission*, 236 Wisc. 240, 295 N.W. 1 (1940), *Chrysler Corporation v. Smith*, 297 Mich. 438, 298 N.W. 87 (1941), *Cornell v. Bailey*, 163 Ohio St. 50, 125 N.E. 2d 323 (1955) and Sections 7 and 8 of the National Labor Relations Act (29 U.S.C. Sections 157-158), *San Diego Building Trades v. Garmon*, 359 U.S. 236 (1959), *Abernathy v. Eastern Airlines*, 259 N.C. 190, 130 S.E. 2d 292 (1963).

CONCLUSION

It is submitted that the questions raised in this appeal are substantial.

It is further submitted that Section 4141.29(D)(1)(a) of the Ohio Revised Code is not in conflict with the Federal Social Security Act.

It is further submitted that Section 4141.29(D)(1)(a) has not been applied in an arbitrary or invidious manner and does not deprive the plaintiff below and those similarly situated of their Due Process and Equal Protection rights under the United States Constitution.

It is further submitted that there is a substantial governmental interest in, and reasonable basis for, the application of Section 4141.29(D)(1)(a) to the plaintiff Hodory and those similarly situated.

It is further submitted that the decision of the three judge district court was contrary to the weight of authority.

It is further submitted that the decision of the three judge district court denies the employers U.S. Steel and Republic Steel of their Due Process rights under the United States Constitution.

For the reasons set forth in this appeal and the cases previously decided by this Court and by the courts of the several states, the appellant moves this court to grant plenary consideration of this case or, in the alternative, either to reverse the decision of the three judge district court or reverse the decision of the three judge district court and remand for further evidentiary hearings.

SECTION 4141.01(I), OHIO REVISED CODE

(I) "Interested party" means the administrator and any party to whom notice of a determination of an application for benefit rights or a claim for benefits is required to be given under section 4141.28 of the Revised Code.

SECTION 4141.01(B)(1)(b), OHIO REVISED CODE 4141.01(B)(3)(a), 4141.01(B)(3)(g)

(B) (1) "Employment" means:

(a) Service performed for wages under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation;

(b) Services performed by an individual for remuneration unless it is shown to the satisfaction of the administrator that such individual:

(i) Has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact;

(ii) That such service is outside the usual course of the business for which service is performed; and

(iii) That such individual is customarily engaged in an independently established trade, occupation, profession, or business.

(2) "Employment" includes:

(a) Service performed after December 31, 1971, by an individual in the employ of the state or any of its instrumentalities, or in the employ of the state and

one or more other states or their instrumentalities, in the classified service as defined in division (B) of section *143.08 of the Revised Code or the services of employees covered by voluntary election, as provided under divisions (A) (4) and (5) of this section;

(i) Service performed after December 31, 1973, by an individual in the employ of any political subdivision of this state or any instrumentality of that political subdivision except for service performed as a substitute teacher employed by a public school district pursuant to section 3319.10 of the Revised Code.

(b) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, solely by reason of section 26 U.S.C.A. 3306 (c) (8) of that act and is not excluded under division (B) (3) of this section;

(c) Service not covered under division (B) (1) (b) of this section which is performed after December 31, 1971:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, laundry, or drycleaning services, for his employer or his principal;

(ii) As a traveling or city salesman, other than as on agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and in the transmission to his employer or his principal except for sideline sales activities on behalf of some other person of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other simi-

* Section 143.08 changed to 124.11, Amend. S. B. No. 174. Eff 12/4/73.

lar establishments for merchandise for resale, or supplies for use in their business operations; provided that for the purposes of this subdivision, the services shall be deemed employment if the contractor of service contemplates that substantially all of the services are to be performed personally by the individual himself and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed.

(d) An individual's entire service performed within or both within and without the state if:

(i) The service is localized in this state.

(ii) The service is not localized in any state, but some of the service is performed in this state and either the base of operations, or if there is no base of operations then the place from which such service is directed or controlled, is in this state or the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state.

(e) Service not covered under division (B) (2) (d) (ii) of this section and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state, the Virgin Islands, Canada, or of the United States, if the individual performing such service is a resident of this state and the administrator of the bureau of employment services

approves the election of the employer for whom such services are performed; or, if he is not a resident of this state but the place from which the service is directed or controlled is in this state, the entire services of such individual shall be deemed to be employment subject to sections 4141.01 to 4141.46 of the Revised Code; provided service is deemed to be localized within this state if the service is performed entirely within this state or if the service is performed both within and without this state but the service performed without this state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions;

(f) Service of an individual who is a citizen of the United States, performed outside the United States except in Canada or the Virgin Islands, after December 31, 1971, in the employ of an American employer, other than service which is "employment" under subdivisions (d) and (e) of this division or similar provisions of another state's law, if:

(i) The employer's principal place of business in the United States is located in this state:

(ii) The employer has no place of business in the United States, but the employer is an individual who is a resident of this state; or the employer is a corporation which is organized under the laws of this state, or the employer is a partnership or a trust and the number of partners or trustees who are resident of this state is greater than the number who are residents of any other state; or

(iii) None of the criteria of subdivisions (B) (2) (f) (i) and (ii) of this section is met but the employer has elected coverage in this state or the employer hav-

ing failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under Chapter 4141. of the Revised Code.

(g) For the purposes of subdivision (B) (2) (f) of this section, the term "American employer" means an employer who is an individual who is a resident of the United States; or a partnership, if two-thirds or more of the partners are residents of the United States; or a trust, if all of the trustees are residents of the United States; or a corporation organized under the laws of the United States or of any state provided, the term "United States" includes the states, the District of Columbia, and the Commonwealth of Puerto Rico.

(h) Notwithstanding any other provisions of subdivisions (1) and (2) of division (B) of this section, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund, or service, which, as a condition for full tax credit against the tax imposed by the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301, is required to be covered under Chapter 4141. of the Revised Code.

(3) "Employment" does not include the following services if they are found not subject to the "Federal Unemployment Tax Act," 84 Stat. 713 (1970), 26 U.S.C.A. 3301, and if the services are not required to be included under division (B) (2) (h) of this section:

(a) Agricultural labor;

(b) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority;

(c) Service performed prior to January 1, 1972, in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of purely governmental functions. Service performed after December 31, 1971, in the employ of any instrumentality of the United States and the following services when performed for this state or a political subdivision as described in division (B) (2) (a) of this section except when performed for a public school district as described in section 3311.01 of the Revised Code, or a hospital or an institution of higher education as defined in divisions (X) and (Z), respectively, of this section as an elected official or any other employee not in the classified service as defined in division (B) of section 143.08* of the Revised Code.

(d) Service performed prior to January 1, 1972, in the employ of a private or parochial school, college, or university as a teacher, in research or experimental work, as an administrative officer, or as a member of the faculty. Service performed after December 31, 1971, in the employ of a nonprofit or parochial school, not an institution of higher education as defined in division (Z) of this sectio;

(e) Service performed prior to January 1, 1972, as a short-time worker by a minor whose principal occupation is a student attending public or private school. Service performed after December 31, 1971:

(i) In the employ of a school, college, or university including those operated by the state or a political subdivision, if such service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; or

(ii) By an individual under the age of twenty-two years who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, provided that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(f) Service performed by an individual in the employ of his son, daughter, or spouse and service performed by a child under the age of eighteen in the employ of his father or mother;

(g) Service performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971:

(i) By an individual for an employer as an insurance agent or as an insurance solicitor, if all this service is performed for remuneration solely by way of commission;

(ii) As a home worker performing work, according to specifications furnished by the employer for whom the services are performed, on materials or goods furnished by such employer which are required to be returned to the employer or to a person designated for that purpose.

(h) Service performed prior to January 1, 1972, in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, and the activities of which are confined exclusively to the rendition of service, or the production of commodities, for its respective religious, charitable, scientific, literary, or educational purposes. Service performed after December 31, 1971:

(i) In the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(iii) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work;

(i) Service performed after June 30, 1939, with

respect to which unemployment compensation is payable under the "Railroad Unemployment Insurance Act," 52 Stat. 1094 (1938), 45 U.S.C. 351;

(j) Service performed by an individual in the employ of any organization exempt from income tax under section 501 of the "Internal Revenue Code of 1954," if the remuneration for such service does not exceed fifty dollars in any calendar quarter, of if such service is in connection with the collection of dues or premiums for a fraternal beneficial society, order, or association and is performed away from the home office or is ritualistic service in connection with any such society, order, or association;

(k) Casual labor not in the course of an employer's trade or business; incidental service performed by an officer, appraiser, or member of a finance committee of a bank, building and loan association, or savings association when the remuneration for such incidental service exclusive of the amount paid or allotted for directors' fees does not exceed sixty dollars per calendar quarter is casual labor;

(l) Service performed in the employ of a voluntary employees' beneficial association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if admission to a membership in such association is limited to individuals who are officers or employees of a municipal or public corporation, of a political subdivision of the state, or of the United States and no part of the net earnings of such association inures, other than through such payments, to the benefit of any private shareholder or individual;

(m) Service performed by an individual in the employ of a foreign government, including service as a

consular or other officer or employee or of a nondiplomatic representative;

(n) Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is of a character similar to that performed in foreign countries by employees of the United States or of an instrumentality thereof and if the administrator finds that the secretary of state of the United States has certified to the secretary of the treasury of the United States that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States and of instrumentalities thereof;

(o) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(p) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to state law;

(q) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(r) Service performed in the employ of the United States or an instrumentality of the United States immune under the constitution of the United States from the contributions imposed by sections 4141.01 to

4141.46 of the Revised Code, except that to the extent that congress permits states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, sections 4141.01 to 4141.46 of the Revised Code, shall be applicable to such instrumentalities and to services performed for such instrumentalities in the same manner, to the same extent, and on the same terms as to all other employers, individuals, and services: provided that if this state is not certified for any year by the proper agency of the United States under section 3304 of the "Internal Revenue Code of 1954," the payments required of such instrumentalities with respect to such year shall be refunded by the administrator from the fund in the same manner and within the same period as is provided in division (E) of section 4141.09 of the Revised Code with respect to contributions erroneously collected;

(s) Service performed by an individual as a member of a band or orchestra; provided such service does not represent the principal occupation of such individual, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971, for a nonprofit organization, a hospital or institution of higher education of this state, or a political subdivision, as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work-relief or work-training;

(t) Service performed in the employ of a day camp whose camping season does not exceed twelve weeks in

any calendar year, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301. Service performed after December 31, 1971:

(i) In the employ of a hospital, if the service is performed by a patient of the hospital, as defined in division (X) of this section; or

(ii) For a hospital in a state prison or other state correctional institution by an inmate of the prison or correctional institution.

(u) Notwithstanding any other provisions of division (B) (3) of this section, services which are excluded under subdivisions (g), (j), (k), and (l) of this division, shall not be excluded from employment when performed for a nonprofit organization, as defined in division (Y) of this section or for a hospital or institution of higher education of this state or for a political subdivision.

SECTION 4141.28(H), (I), (J), OHIO REVISED CODE

(H) Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith.

(I) Requests for reconsideration or appeals may be filed with the board, with the administrator or one of his deputies, with an employee of another state or federal agency, or with an employee of the unemployment

insurance commission of Canada charged with the duty of accepting claims. Any timely written notice stating that the interested party desires a review of the previous determination or decision therefor, shall be accepted.

(J) When an appeal from a decision on reconsideration of the administrator or deputy is taken, all interested parties shall be notified and the board or a referee shall, after affording such parties reasonable opportunity for a fair hearing, affirm, modify, or reverse the findings of fact and the decision of the administrator or deputy in the manner which appears just and proper. In the conduct of such hearing or any other hearing on appeal to the board which is provided in this section, the board and the referees shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. The board and the referees shall take any steps in such hearing.

(1) The failure of the claimant or other interested party to appear at a hearing, unless he is the appealing party, shall not preclude a decision in his favor, if on the basis of all the information in the record, including that contained in the file of the administrator, he is entitled to such decision.

SECTION 4141.29, OHIO REVISED CODE

4141.29 Eligibility and qualification for benefits.

Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in sections 4141.01 to 4141.46 of the Revised Code.

(A) No individual is entitled to a waiting period or benefits for any week unless he:

(1) Has filed a valid application for determination of benefit rights in accordance with section 4141.28 of the Revised Code;

(2) Has made a claim for benefits in accordance with section 4141.28 of the Revised Code;

(3) Has registered at an employment office or other registration place maintained or designated by the administrator of the bureau of employment services. Registration shall be made in person or in writing in accordance with the time limits, frequency, and manner prescribed by the administrator.

(4) (a) Is able to work and available for suitable work and is actively seeking suitable work either in a locality in which he has earned wages subject to Chapter 4141. of the Revised Code, during his base period, or if he leaves such locality, then in a locality where suitable work is normally performed.

The administrator may waive the requirement that a claimant be actively seeking work when he finds that an individual has been laid off and the employer who laid him off has notified the administrator within ten days after the layoff, that work is expected to be available for the individual within a specified number of days not to exceed forty-five calendar days following the last day the individual worked. In the event the individual is not recalled within the specified period, such waiver shall cease to be operative with respect to such layoff.

(b) The individual shall be instructed as to the efforts that he must make in his search for suitable work, except where the active search for work requirement has been waived under division (A) (4) (a) of this section, and shall keep a record of where and when he has sought work in complying with such instruc-

tions and shall, upon request, produce such record for examination by the administrator.

(c) An individual who is attending a vocational training course, approved by the Ohio worker training committee or the administrator, meets the requirement of this division, if such attendance was recommended by the administrator and the individual is regularly attending the course, and is making satisfactory progress.

(d) An individual who becomes unemployed while attending a regularly established school and whose base period credit weeks were earned in whole or in part while attending such school, meets the availability and active search for work requirements of division (A) (4) (a) of this section if he makes himself available on any shift of hours for suitable employment with his most recent employer or any other employer in his base period, or for any other suitable employment to which he is directed, under Chapter 4141. of the Revised Code.

(e) The administrator shall adopt such rules and regulations as he deems necessary for the administration of division (A) (4) of this section.

(5) Is unable to obtain suitable work.

(B) An individual suffering total or partial unemployment is eligible for benefits for unemployment occurring subsequent to a waiting period of one week and no benefits shall be or become payable during this required waiting period, but no more than one week of waiting period shall be required of any such individual in any benefit year in order to establish his eligibility for total or partial unemployment benefits.

(C) The waiting period for total or partial unemployment shall commence on the first day of the first week with respect to which the individual first files a

claim for benefits at an employment office or other place of registration maintained or designated by the administrator or on the first day of the first week with respect to which he has otherwise filed a claim for benefits in accordance with the rules and regulations of the bureau of employment services, provided such claim is allowed by the administrator or his deputy.

(D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

(1) For any week with respect to which the administrator finds that:

(a) His unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this or any other state and owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute. No individual shall be disqualified under this provision if his employment was with an employer not involved in the labor dispute but whose place of business was located within the same premises as the employer engaged in the dispute, unless his employer is a wholly owned subsidiary of the employer engaged in the dispute, or unless he actively participates in or voluntarily stops working because of such dispute. If it is established that the claimant was laid off for an indefinite period and not recalled to work prior to the dispute, or was separated by the employer prior to the dispute for reasons other than the labor dispute, or that he obtained a bona fide job with another employer while the dispute was still in progress, such labor dispute shall not render the employee ineligible for benefits.

(b) He has been given a disciplinary layoff for misconduct in connection with his work.

(2) For the duration of his unemployment if the administrator finds that:

(a) He quit his work without just cause or has been discharged for just cause in connection with his work, provided division (D) (2) of this section does not apply to the separation of a person under any of the following circumstances:

(i) Separation from employment for the purpose of entering the armed forces of the United States if he makes application to enter, or is inducted into such armed forces within thirty days after such separation;

(ii) Separation from employment pursuant to a labor-management contract or agreement, or pursuant to an established employer plan, program, or policy, which permits the employee, because of lack of work, to accept a separation from employment;

(iii) He has left his employment to accept a recall from a prior employer or to accept other employment as provided under section 4141.291 [4141.29.1] of the Revised Code, or has left employment which is or was concurrent employment where the remuneration, hours, or other conditions of such employment are substantially less favorable than his other work which was performed during such concurrent employment and where such employment, if offered as new work, would be considered not suitable under the provisions of divisions (E) and (F) of this section. Any benefits which would otherwise be chargeable to the account of the employer from whom an individual has left employment under conditions described in division (D) (2) (a) (iii) of this section, shall instead be charged to the mutualized account as provided in division (C) of section 4141.291 [4141.29.1] of the Revised Code.

(b) He has refused without good cause to accept an offer of suitable work when made by an employer either in person or to his last known address, or has refused or failed to investigate a referral to suitable work when directed to do so by a local employment office of this state or another state; provided, that this division shall not cause a disqualification for a waiting week or benefits under the following circumstances:

(i) When work is offered by his employer and he is not required to accept the offer pursuant to the terms of the labor-management contract or agreement, or pursuant to an established employer plan, program, or policy; or

(ii) When the individual is attending a vocational training course pursuant to division (A) (4) of this section except, in the event of a refusal to accept an offer of suitable work or a refusal or failure to investigate a referral, benefits thereafter paid to such individual shall not be charged to the account of any employer and, except as provided in division (B) (1) (b) of section 4141.241 [4142.24.1] of the Revised Code, shall be charged to the mutualized account as provided in division (C) of section 4141.25 of the Revised Code.

(c) Such individual quit work to marry or because of marital, parental, filial, or other domestic obligations or became unemployed because of pregnancy.

(d) He has knowingly made a false statement or representation or knowingly failed to report any material fact with the object of obtaining benefits to which he is not entitled.

(e) He became unemployed by reason of commitment to any penal institution.

(f) He became unemployed because of dishonesty in connection with his most recent or any base period

work. Remuneration earned in such work shall be excluded from such individual's total base period remuneration for the purpose of determining the total benefits to which such individual is entitled under division (D) of section 4141.30 of the Revised Code, and shall be excluded from the maximum amount to be charged, under division (D) of section 4141.24 of the Revised Code, against the account of the employer who discharged such individual. In addition, no benefits shall thereafter be paid to such individual based upon such remuneration.

(E) No individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept new work if:

(1) As a condition of being so employed he would be required to join a company union, or to resign from or refrain from joining any bona fide labor organization, or would be denied the right to retain membership in and observe the lawful rules of any such organization.

(2) The position offered is vacant due directly to a strike, lockout, or other labor dispute.

(3) The work is at an unreasonable distance from his residence, having regard to the character of the work he has been accustomd to do, and travel to the place of work involves expenses substantially greater than that required for his former work, unless the expense is provided for.

(4) The remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality.

(F) In determining whether any work is suitable for a claimant in the administration of sections

4141.01 to 4141.46 of the Revised Code, the administrator shall, in addition to the determination required under division (E) of this section, consider the degree of risk to the claimant's health, safety, and morals, his physical fitness for the work, his prior training and experience, the length of his unemployment, the distance of the available work from his residence, and his prospects for obtaining local work.

(G) "Duration of his unemployment," as used in this section, means the full period of unemployment next ensuing after a separation from any base period or subsequent work and until an individual has become re-employed in employment subject to sections 4141.01 to 4141.46 of the Revised Code, or the unemployment compensation act of another state, or of the United States, and until such individual has worked six weeks and has earned wages equal to three times his average weekly wage or three hundred sixty dollars, whichever is less, except for purposes of division (D) (2) (c) of this section, such term means the full period of unemployment next ensuing after a separation from such work and until such individual has become re-employed subject to the terms set forth above, and has earned wages equal to one half of his average weekly wage or sixty dollars, whichever is less, provided that in the case of a woman who became unemployed because of pregnancy such duration of unemployment shall continue until such time, after the date of her delivery, as she furnishes medical evidence that she is fully able to work, and that work with her former employer is no longer available, provided if she has made a bona fide change in residence which makes a return to work with her former employer unreasonable, because of distance, then her duration of unemployment may be

ended the same as described in this division for disqualifications under division (D) (2) (c) of this section.

(H) Except as provided in division (B) (1) (b) of section 4141.241 [4141.24.1] of the Revised Code, if a claimant is disqualified under division (D) (2) (a), (c), or (e) of this section, then benefits which may become payable to such claimant, which are chargeable to the account of the employer from whom he was separated under disqualifying conditions, shall be charged to the mutualized account provided in section 4141.25 of the Revised Code, such charges to be made in accordance with the charge sequence provided in section 4141.24 of the Revised Code; except, if the disqualification is for reason of pregnancy, under division (D) (2) (c) of this section, benefits shall be charged to the mutualized account only when the claimant has voluntarily discontinued her employment because of pregnancy.

(I) Benefits based on service in employment as provided in divisions (B) (2) (a) and (B) (2) (b) of section 4141.01 of the Revised Code, shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to Chapter 4141. of the Revised Code; except that benefits based on service in an instructional, research, or principal administrative capacity in an institution of higher education, as defined in division (Z) of section 4141.01 of the Revised Code, shall not be paid to an individual for any week of unemployment which begins during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave

provided for in the individual's contract, if the individual has a contract or contracts to perform services in any such capacity for any institution or institutions of higher education for both such academic years or both such terms. Benefits based on service in an instructional, research, or principal administrative capacity for a public school district shall not be paid to any individual for any week of unemployment which begins during the period between two successive academic years or terms of the employing school district provided the individual was in employment with the school district at the termination of the first such academic year or term.

SECTION 4141.301, OHIO REVISED CODE

4141.301 Extended benefits.

(A) As used in this section, unless the context clearly requires otherwise:

(1) "Extended benefit period" means a period which:

(a) Begins with the third week after whichever of the following weeks occurs first:

(i) A week for which there is a national "on" indicator; or

(ii) A week for which there is a state "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(i) The third week after the first week for which there is both a national "off" indicator and a state "off" indicator; or

(ii) The thirteenth consecutive week of such period;

Except, that no extended benefit period may begin by reason of a state "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state, and that within the period beginning on the effective date of this section and ending on December 31, 1971, an extended benefit period may become effective and be terminated in this state solely by reason of a state "on" indicator and a state "off" indicator, respectively.

(2) A "national 'on' indicator" exists for a week if the United States secretary of labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment, seasonally adjusted, for all states equaled or exceeded four and five-tenths per cent.

* * *

(4) There is a "state 'on' indicator" for this state for a week if the administrator determines, in accordance with the regulations of the United States secretary of labor, that for the period consisting of such week and the immediately preceding twelve weeks, the rate of insured unemployment, not seasonally adjusted, under Chapter 4141. of the Revised Code:

* * *

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address — Leonard P. Hodory, 1810 Paisley St., APT #24, Youngstown, Oh. 44515

2. Employer's Name and Address — United States Steel Corp., Youngstown District, Attn: A. Johnston, 1509 Muriel St., Pittsburgh, Pa. 15203

3 Date Mailed 1-3-75

4 Social Security Account Number 289 42 5007

5 Benefit Year Began 11-10-74

6 Local Office Number 809-1

7 THIS NOTICE IS A DETERMINATION OF:
- [X] (a) First Weekly Claim
- [ ] (b) Additional (Reopened) Weekly Claim
- [ ] (c) Continued Weekly Claim
- [ ] (d) Other — See Decision Below

8 ISSUE(S): LABOR DISPUTE 11-5-74

APPLICABLE LAW: ... Section 4141.29(D)(1)(a) Ohio Law

A labor dispute started at coal mines owned and operated by U.S. Steel Corporation and claimant is unemployed because of this labor dispute. The law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute.

Accordingly claim for week ending 11-16-74 is hereby disallowed.

Week ending 11-16-74 is further disallowed as claimant had earnings in excess of his weekly benefit amount.

Exhibit "2"

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address — Leonard P. Modory, 1010 Paisley St. Apt. 24, Youngstown, Ohio 44505

2. Employer's Name and Address —

3. Date Mailed 1 2 3 75

4. Social Security Account Number 289-42-5007

5. Benefit Year Began 11-10-74

6. Local Office Number 809-1

7. THIS NOTICE IS A DETERMINATION OF:
- ☐ (a) First Weekly Claim
- ☐ (b) Additional (Reopened) Weekly Claim
- ☒ (c) Continued Weekly Claim
- ☐ (d) Other — See Decision Below

8. ISSUE(S): Labor Dispute 11-15-74 - 1-11-75

APPLICABLE LAW: ... 4141.29(D)(1)(a) Ohio Law

During the period between 11-15-74 and 1-11-75 a labor dispute existed at coal mines owned and operated by United States Steel. This dispute caused a curtailment of operations at the United States Steel plant in Youngstown, Ohio, where claimant was employed. As a result of such curtailment, claimant was separated from his employment with United States Steel.

Section 4141.29 (D)(1)(a) Ohio law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute that exists anywhere at an establishment owned and operated by his employer. Accordingly, claims for unemployment benefits for the following weeks are hereby disallowed.

Week Ending 11-23-74	Week Ending 12-21-74
Week Ending 11-30-74	Week Ending 12-28-74
Week Ending 12-07-74	Week Ending 01-04-75
Week Ending 12-14-74	Week Ending 01-11-75

OHIO BUREAU OF EMPLOYMENT SERVICES

DETERMINATION OF BENEFITS

TO CLAIMANT: This notice is a determination of your claim. Your eligibility to receive benefits for this claim has been determined according to the decision shown in item 8.

1. Claimant's Name and Address — O. C. Webster, 111 Columbia St., Youngstown, Ohio 44510

2. Employer's Name and Address — Republic Steel Corp. Plt. 20

3. Date Mailed 1 / 1 75

4. Social Security Account Number 426-30-1364

5. Benefit Year Began 12-29-74

6. Local Office Number 869-0

7. THIS NOTICE IS A DETERMINATION OF:
- ☐ (a) First Weekly Claim
- ☐ (b) Additional (Reopened) Weekly Claim
- ☒ (c) Continued Weekly Claim
- ☐ (d) Other — See Decision Below

8. ISSUE(S): LABOR DISPUTE
11-17-74 through 1-11-75

APPLICABLE LAW: ... Sec. 4141.29(D)(1)(a) Ohio Law

From 11-17-74 through 1-11-75 claimant was unemployeddue to a labor dispute at coal mines owned and operated by Republic Steel Corp. The law provides that no individual may serve a waiting period or be paid benefits for so long as his unemployment is due to a labor dispute. Accordingly, claim for week ending 1-11-75 is hereby disallowed.

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

Filed Mar. 5 9:13 AM '76
No. C 75-15 Y

MEMORANDUM OPINION AND ORDER

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-mentioned action, pursuant to 42 U.S.C. §1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in §4141.29 (D) (1) (a) of the Ohio Revised Code.

Hodory challenged the constitutionality of §4141.29 (D) (1) (a) on grounds that: the provision is in conflict with §303(a)(1) of the Federal Society Security Act, 42 U.S.C. §503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the

14th Amendment to the United States Constitution; and the overbroad disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing §4141.29 (D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U.S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of Employment Services (Employment Bureau) that his claim was disallowed, pursuant to §4141.29(D)(1)(a) O.R.C.

Section 4141.29 (D) (1) (a) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or

be paid benefits under the following conditions: (1) for any week with respect to which the administrator finds that:

(a) **His unemployment was due to a labor dispute** other than a lockout **at any factory, establishment, or other premises** located in this or any other state and **owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute** . . . Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in §4141.29 (D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal is still pending. It is being considered along with the appeals of the approximately 1250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit §4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am. Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. CONCLUSIONS OF LAW

A. Availability of Relief in this Court

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative proceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. §2283, the Anti-injunction statute. *Mitchum v. Foster*, 407 U.S. 225 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger v. Harris*, 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson v. Berryhill, supra*, 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson*, the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. §1983. Moreover, in the instant action, exhaustion of the available administrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in this case. Section 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was

laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1250 United Steelworkers, who were similarly effected by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of §4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plaintiff's failure to exhaust his administrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger v. Harris, supra*, and the Court's subsequent decision in *Huffman v. Pursue*, 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to

---

[1] In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes v. Board of Review*, Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that §4141.29(D)(1)(a) does not create an unconstitutional classification in violation of the Equal Protection clause of the 14th Amendment. *Cornell v. Bailey*, 163 Ohio St. 50 (1955); *Continental Can Company, Inc. v. Donahue*, 5 Ohio St. 2nd 224 (1966). In *Cornell v. Bailey*, the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. §1983 in which a party was challenging state administrative action in federal court. *Supra*, n.21.

Finally, this Court concludes that abstention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by a limiting construction in the state courts. *Daniels v. Waters*, F.2d (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay v. Board of Registration Commissioners*, 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under §4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. Class Certification

Plaintiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of §4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in §4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2)[3]. In light of the fact that the class is certi-

[2] At the hearing, plaintiff stated that the claims of some 6100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

[3] The fact that plaintiff seeks the award of past unemployment benefits does not effect the certification of this class as a Rule 23(b)(2) class. The monetary relief is essential in the nature of equitable relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez v. U.S. Department of Agriculture*, 490 F.2d 718 (D.C. Cir. 1973); *see also, Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶23.40.

fied as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes that notice prior to the determination of the claims herein is not required.

C. Constitutional Validity of §4141.29(D)(1)(a)

Plaintiff has challenged the constitutionality of §4141.29(D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. §1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislative pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In §4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to **involuntary** total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of §4141.29(d)(1) reflect that an individual may not receive benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work to become married or because of marital, parental, filial or other domestic obligations, or become unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those persons who fall within the labor dispute disqualification found in §4141.29(D)(1)(a).[5]

[4] The statute was previously held constitutional in the case of *Lasko v. Garnes*, No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy was the basis of the challenge.

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of §4141.29(D)(1)(a) were that:

> 1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;
> 2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the unions. If the financial burden of supporting its striking union members is shifted from the unions' treasury to the State of Ohio, it's con-

[5] Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect the status of plaintiff and the class for the period during which they were denied benefits pursuant to §4141.29(D)(1)(a).

ceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;

3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U.S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect his employer's financial ability to continue to employ him. The fact that the plaintiff and the 1250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed **union members** per se, but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is involved in a labor dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the **Steelworkers** would have placed U.S. Steel or Republic Steel at an unfair disadvantage in negotiations with the **coal miners' union.** Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by §4141.29(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. §1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of §4141.29 (D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also vio-

lates plaintiffs' right to due process of law guaranteed by the 14th Amendment and 42 U.S.C. §1983.

Since the Court has declared the application of §4141.29(D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. Relief

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, §4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce §4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of §4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: March 4, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

Filed Mar. 9:13 AM '76
No. C 75-15 Y

JUDGMENT

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code §4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of §4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: March 4, 1976

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff-Appellee

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

Filed Apr. 6 2:45 PM '76
No. C 15-15 Y

ORDER

Pursuant to Rule 62(c), Federal Rules of Civil Procedure and upon request of the defendants, the Court hereby suspends the injunctive relief granted in the Judgment entered in the above-styled case on March 5, 1976. The stay shall continue in effect until the conclusion of the appeal taken by defendants. The defendants need not post bond.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE,
Circuit Judge
THOMAS D. LAMBROS,
District Judge
ROBERT B. KRUPANSKY,
District Judge

DATED: April 6, 1976

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants

Filed Mar. 26 3:29 PM '76

CIVIL ACTION NO. C 75-15 Y
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Ohio Bureau of Employment Services, Albert G. Giles, Administrator, defendants above named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the United States District Court, Northern District of Ohio, Eastern Division entered in this action on March 4, 1976 and filed on March 5, 1976.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

WILLIAM J. BROWN,
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RICHARD A. SZILAGY,
Assistant Attorney General
Ohio Bureau of Employment Services
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 1976, copies of this Notice of Appeal were mailed, postage prepaid, to Thomas P. Lordeon and Robert M. Clyde, Jr., and Fred A. Culver, Attorneys for Plaintiff at 804 Central Tower Building, Youngstown, Ohio 44503.

I further certify that all parties required to be served have been served.

RICHARD A. SZILAGY,
Assistant Attorney General
Ohio Bureau of Employment Services
145 South Front Street
Columbus, Ohio 43215
614/466-2707

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LEONARD PAUL HODORY,
Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants

CIVIL ACTION NO. C 75-15 Y

MOTION TO CERTIFY THE RECORD AND TRANSMIT TO THE UNITED STATES SUPREME COURT

The defendants, Ohio Bureau of Employment Services and Albert G. Giles, intend to file in the Supreme Court of the United States a Notice of Appeal for a review of the order and judgment entered in the above-entitled proceeding.

The defendants accordingly request that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, a copy of the entire record that was before this court in the above captioned case, including the opinion, order and judgment of this court.

WILLIAM J. BROWN,
Attorney General
RICHARD A. SZILAGY,
Assistant Attorney General
Ohio Bureau of Employment Services
145 South Front Street
Columbus, Ohio 43215
614/466-2707
Attorneys for Defendants

TABLE 405.--DISQUALIFICATION FOR UNEMPLOYMENT CAUSED BY LABOR DISPUTE

State	Duration of disqualification			Disputes excluded if caused by--			Individuals are excluded if neither they nor any of the same grade or class are--		
				Employer's failure to conform to--					
	During stoppage of work due to dispute (29 States)	While dispute in active progress (12 States)	Other (11 States)	Contract (4 States)	Labor law (4 States)	Lockout (16 States)	Participating in dispute (43 States)	Financing dispute (30 States)	Directly interested in dispute (43 States)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Ala.	. . . .	X	. . .	. . . .	. . . .	. . . . .	. . . . .	. . . .	. . . . .
Alaska	X	. . . .	X[1]	X	X	. . . . .	X	. . . .	X
Ariz.	. . . .	. . . .	X[2]	X	X	. . . . .	X	X	X
Ark.	. . . .	. . . .	X[2]	. . . .	. . . .	X	X	. . . .	X
Calif.	. . . .	X	. . .	. . . .	. . . .	X[2]	. . . . .	. . . .	. . . . .
Colo.	. . . .	. . . .	X[2]	. . . .	. . . .	X[2][10]	X	X	X
Conn.	. . . .	. . . .	X[2]	. . . .	. . . .	X	X	X	X
Del.	X	. . . .	. . .	. . . .	. . . .	. . . . .	. . . . .	. . . .	. . . . .
D.C.	. . . .	X	. . .	. . . .	. . . .	. . . . .	X	. . . .	X
Fla.	. . . .	X	. . .	. . . .	. . . .	. . . . .	X	X	X
Ga.	X[2][3]	. . . .	. . .	. . . .	. . . .	X	X	X	X
Hawaii	X	. . . .	. . .	. . . .	. . . .	. . . . .	X	. . . .	X
Idaho	. . . .	. . . .	X[2]	. . . .	. . . .	. . . . .	X	X[4]	X
Ill.	X[2][5]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Ind.	X[2][5]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Iowa	X	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X[2]
Kans.	X	. . . .	. . .	. . . .	. . . .	. . . . .	X[2]	X	X
Ky.	. . . .	X	. . .	. . . .	. . . .	X	. . . . .	. . . .	X[4]
La.	. . . .	X	. . .	. . . .	. . . .	. . . . .	X[4]	. . . .	X
Maine	X[2]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Md.	X	. . . .	. . .	. . . .	. . . .	X	X	X	X
Mass.	X[2][7]	. . . .	. . .	. . . .	. . . .	. . . . .	X	X	X
Mich.	. . . .	. . . .	X[2]	. . . .	. . . .	X[2][9]	X[4]	X[4]	X[4][8]
Minn.	. . . .	X	. . .	. . . .	. . . .	X	X[2][6]	. . . .	X[2][8]
Miss.	X	. . . .	. . .	. . . .	. . . .	X	X	. . . .	X

(Table continued on next page)

TABLE 405.--DISQUALIFICATION FOR UNEMPLOYMENT CAUSED BY LABOR DISPUTE (CONTINUED)

State	Duration of disqualification			Disputes excluded if caused by--			Individuals are excluded if neither they nor any of the same grade or class are--		
				Employer's failure to conform to--					
	During stoppage of work due to dispute (29 States)	While dispute in active progress (12 States)	Other (11 States)	Contract (4 States)	Labor law (4 States)	Lockout (16 States)	Participating in dispute (43 States)	Financing dispute (30 States)	Directly interested in dispute (43 States)
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Mo.	X[2]	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
Mont.	X	. . . .	. . .	. . . .	X	. . . .	X	X	X
Nebr.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
Nev.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	X	X
N.H.	X[2][3]	. . . .	. . .	X	. . . .	X	X	X	X
N.J.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
N.Mex.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	. . . .	X
N.Y.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	. . . . .	. . . .	. . . . .
N.C.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	. . . . .	. . . .	. . . . .
N.Dak.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	. . . .	X
Ohio	. . . .	. . . .	X[2][10]	. . . .	. . . .	X	. . . . .	. . . .	. . . . .
Okla.	X	. . . .	. . .	. . . .	. . . .	X	X	. . . .	X
Oreg.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	X	X
Pa.	X	. . . .	. . .	. . . .	. . . .	X	X	. . . .	X
P.R.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	. . . .	X
R.I.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	X[4]	X[4]	X[4]
S.C.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	X[4]	X
S.Dak.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
Tenn.	. . . .	X	. . .	. . . .	. . . .	. . . .	X	. . . .	X
Tex.	X[2]	. . . .	. . .	. . . .	. . . .	. . . .	X[2]	X[2]	X[2]
Utah	X[2][10]	. . . .	. . .	. . . .	X	X[2]	. . . . .	. . . .	(2)[4]
Vt.	X	. . . .	. . .	. . . .	. . . .	. . . .	X[4]	X[4]	X[2][4]
Va.	. . . .	. . . .	X[2]	. . . .	. . . .	. . . .	X	X	X
Wash.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X
W.Va.	X[2][11]	. . . .	. . .	X[2]	. . . .	X	X	X	X
Wis.	. . . .	X	. . .	. . . .	. . . .	. . . .	. . . . .	. . . .	. . . . .
Wyo.	X	. . . .	. . .	. . . .	. . . .	. . . .	X	X	X

(Footnotes on next page)

ELIGIBILITY

(Footnotes for Table 405)

1/ So long as unemployment is caused by existence of labor dispute.

2/ See text for details.

3/ By judicial construction of statutory language.

4/ Applies only to individual, not to others of same grade or class.

5/ Disqualification is not applicable if claimant subsequently obtains covered employment and: earns 8 x wba or has been employed 5 full wks., Maine; earns at least $900, Mass.; works at least 5 consec. wks. in each of which claimant earned 120% of wba, N.H.; earns $700 with at least $20 in each of 19 different calendar wks., Utah. However, BPW earned from ER involved in the labor dispute cannot be used to pay benefits during such labor dispute, Mass. and Utah.

6/ Fixed period: 7 consec. wks. and the waiting period or until termination of dispute, N.Y.; 6 wks. and waiting period, R.I. See Table 303 for waiting period requirements.

7/ So long as unemployment is caused by claimant's stoppage of work which exists because of labor dispute. Failure or refusal to cross picket line of to accept and perform available and customary work in the establishment constitutes participation and interest.

8/ Disqualification is not applicable if employees are required to accept wages, hours, or other conditions substantially less favorable than those prevailing in the locality or are denied the right of collective bargaining.

9/ Disqualification not applicable to any claimant who failed to apply for or accept recall to work with an ER during a labor dispute work stoppage if claimant's last separation from ER occurred prior to work stoppage and was permanent.

10/ Applicable only to establishments functionally integrated with the establishments where the lockout occurs, Mich. Employee not ineligible: unless the lockout results from demands of employees as distinguished from an ER effort to deprive the employees of some advantage they already possess, Colo.; if individual was laid off and not recalled prior to the dispute, if separated prior to the dispute, if obtained bona fide job with another ER while dispute was in progress, Ohio; if the ER was involved in fomenting the strike, Utah.

11/ Disqualification ceases: when operations have been resumed but individual has not been reemployed, Ga.; within 1 wk. following termination of dispute if individual is not recalled to work, Mass. If the stoppage of work continues longer than 4 wks. after the termination of the labor dispute, there is a rebuttable presumption that the stoppage is not due to the labor dispute and the burden is on the ER to show otherwise, W.Va.

12/ Disqualification limited to 1 wk. for individuals not participating in nor directly interested in dispute.

ELIGIBILITY

CERTIFICATION OF STATES OF THE SECRETARY OF THE TREASURY

In accordance with the provisions of section 3304(c) of the Internal Revenue Code of 1954 (26 U.S.C. 3304 (c)), I hereby certify the following named States to the Secretary of the Treasury for the 12-month period ending October 31, 1975, in regard to the unemployment compensation laws of those States which heretofore have been approved under the Federal Unemployment Tax Act.

Alabama	Kentucky	Ohio
Alaska	Louisiana	Oklahoma
Arizona	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Massachusetts	Puerto Rico
Colorado	Michigan	Rhode Island
Connecticut	Minnesota	South Carolina
Delaware	Mississippi	South Dakota
District of Columbia	Missouri	Tennessee
Florida	Montana	Texas
Georgia	Nebraska	Utah
Hawaii	Nevada	Vermont
Idaho	New Hampshire	Virginia
Illinois	New Jersey	Washington
Indiana	New Mexico	West Virginia
Iowa	New York	Wisconsin
Kansas	North Carolina	Wyoming
	North Dakota	

Signed at Washington, D.C. this 31st day of October, 1975.

JOHN T. DUNLOP,
Secretary of Labor

(FR Doc. 75-29727 Filed 11-4-15; 8:45am)
Federal Register, Vol. 40 No. 214 — Wednesday, November 5, 1975, Page 51520.